

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-41079

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 77-4079

NEW YORK STATE COMMISSION ON CABLE TELEVISION,

Petitioner-Appellants,

-against-

FEDERAL COMMUNICATIONS COMMISSION AND UNITED
STATES OF AMERICA,

Respondents-Appellees,

MANHATTAN CABLE TELEVISION, INC., NEW YORK STATE
CABLE TELEVISION ASSOCIATION,

Intervenors.

TO REVIEW A DETERMINATION OF THE
FEDERAL COMMUNICATIONS COMMISSION

JOINT APPENDIX

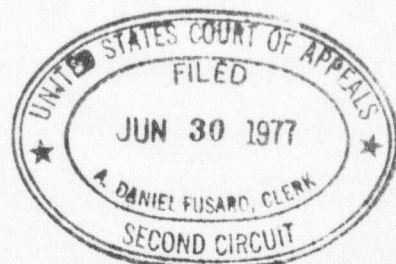
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PAGINATION AS IN ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
Cable Television History Card.	1
Declaratory Ruling, Adopted June 24, 1976.	3
Declaratory Ruling on Petition for Reconsideration, Adopted February 3, 1977.	17
Petition for Reconsideration.	29
Opposition to Petition for Reconsideration of Manhattan Cable Television, Inc.	52
Opposition to Petition for Reconsideration of The New York State Cable Television Association.	66

CABLE TELEVISION HISTORY CARD

1

THE COMMISSION ON CABLE TELEVISION OF THE STATE OF NEW YORK

Name of Cable Television System

Community

Cable No.

Code No.

File No.	Date Filed	Description	Action	
			Nature	Eff. Date
CSR-654	1/23/75	PETITION FOR DECLARATORY RULING to declare Section 817 of the New York State Executive Law consistent with Section 76.31(b) of the Cable Television Rules, filed by the Commission on Cable Television of the state of New York.	GRANTED in part DENIED in part MEMO OP & ORDER ADOPTED FCC 76-599	6-24-77
PRESS				
SEE OTHER SIDE				

CSR-654

- 2-24-75 - RESPONSE TO PETITION FOR DECLARATORY RULING filed by the New York State Cable TV Asso.
- 3-28-75 - MOTION FOR LEAVE TO FILE REPLY filed by New York State Commission on Cable TV.
- 4-3-75 - MOTION TO CONSOLIDATE filed by Lewis I. Cohen for N. Y. State Cable TV Asso.
- 6-9-75 - SUPPLEMENT TO RESPONSE TO PETITION FOR DECLARATORY RULING filed by Lewis I. Cohen for New York State Cable TV Asso.
- 8-12-75 - SUPPLEMENT TO RESPONSE TO PETITION FOR DECLARATORY RULING filed by The New York Cable TV Asso.
- 8-8-75 - STATEMENT OF SUBSTANTIAL CHANGE IN INFORMATION FURNISHED TO THE COMMISSION filed by New York State Commission on Cable TV.
- 8-25-75 - REPLY TO SUPPLEMENT TO RESPONSE TO PETITION FOR DECLARATORY RULING filed by New York State Commission on Cable TV.
- 8-31-76 - COMMENTS OF MANHATTAN CABLE TELEVISION, INC. filed by David W. Smith.
- 8-9-76 - PETITION FOR RECONSIDERATION filed by Josh Koenig for New York State Commission on Cable TV.
- 8-18-76 - MOTION FOR EXT. OF TIME TO OPPOSITION PETITION FOR RECONSIDERATION filed by W. Theodore Pierson, Jr. for Manhattan Cable Television, Inc.
- 9-2-76 - OPPOSITION TO PETITION FOR RECONSIDERATION filed by Manhattan Cable TV, Inc.
- 9-2-76 - OPPOSITION TO PETITION FOR RECONSIDERATION filed by The New York Cable TV Asso.
- 2-3-77 - PETITION FOR RECONSIDERATION filed by the New York State Commission on CATV is GRANTED in part and DENIED in part by Memo. Op. & Order Adopted.
- *4-24-75 - "Opposition of New York State Commission on Cable Television to Motion to Consolidate" filed by the New York State Commission on Cable Television.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NEW YORK STATE COMMISSION	)	
ON CABLE TELEVISION,	)	
Petitioner,	)	
	)	
v.	)	No. 77-4079
	)	
FEDERAL COMMUNICATIONS	)	
COMMISSION and UNITED STATES	)	
OF AMERICA,	)	
Respondents,	)	
	)	
NEW YORK STATE CABLE	)	
TELEVISION ASSOCIATION,	)	
Intervenor.	)	

CERTIFICATE OF VINCENT J. MULLINS, SECRETARY,
FEDERAL COMMUNICATIONS COMMISSION

I, Vincent J. Mullins, Secretary, Federal Communications Commission, do hereby certify that the preceding list is a true and correct list of the items comprising a record of the proceedings before the Federal Communications Commission considered pertinent to the above-entitled case.

Witness my hand and Seal of the Federal Communications Commission this 29th day of April, 1977.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins,
Secretary

In re)
NEW YORK STATE COMMISSION) CSR-654
ON CABLE TELEVISION)
Petition for Declaratory Ruling)

Adopted: June 2, 1976
Released: July 9, 1976

[§85:31] Franchise fees.

A state fee assessed.. to recoup regulatory costs, on the gross annual receipts of cable systems rather than on gross annual subscriber revenues is consistent with Rule 76.31(b), so long as the fee payable may be translated into a percentage of gross subscriber revenue which does not exceed the 3% to 5% range. Insofar, as the state fee when combined with an applicable municipal fee compels cable operators to pay in excess of 3% of their total gross subscriber revenues, a special showing of consistency is required. Insofar as the state fee when combined with an applicable grandfathered municipal fee exceeds 5% of total gross subscriber revenues, the state fee is not consistent with Rule 76.31(b). New York State Commission on Cable Television, 37 RR 2d 1145[1976].

DECLARATORY RULING

By the Commission: (Chairman Wiley concurring in the result; Commissioner Lee absent; Commissioner Quello dissenting and issuing a statement.)

Introduction

1. On January 23, 1975, the Commission on Cable Television of the State of New York (CCT), an agency of the State of New York charged with regulation of cable television systems within the state, filed a Petition for Declaratory Ruling, requesting the Commission's advice as to whether CCT's system of allocation and collection of its operating expenses of up to two percent 1/

1/ The original petition sought advice relative to a one percent gross receipts state fee. During the pendency of this petition, the New York legislature amended the applicable statute to allow for a two percent fee. CCT accordingly amended its petition to include the higher fee.

of "gross annual receipts" among the various cable television systems operating in the State is consistent with §76.31(b) of the Commission's rules. The New York State Cable Television Association (Association), a trade association of New York State cable television operators, filed a "Response" to the petition. CCT has replied to the Association's response. The Association also filed two supplemental pleadings, one in response to a statement from CCT updating certain information in its initial filing. 2/ On March 31, 1976, Manhattan Cable Television, Inc., (MCTV) filed its comments.

2. The essential controversy is whether Section 817 of Article 28 of the New York State Executive Law which authorizes the CCT to collect a fee from the New York cable television industry is consistent with §76.31(b) of the Commission's rules which places limits on the collection of cable television franchise fees.

Background

3. Article 28 of the New York Executive Law, effective May 24, 1972, provides a comprehensive state regulatory program applicable to cable television systems and for the establishment of the CCT which is charged with the administration of the regulatory program. Section 817 of Article 28 establishes a procedure by which CCT's costs and expenses, which are defrayed in the first instance out of the State treasury, are reimbursed by the cable television industry. In essence, Section 817 provides that its expenses shall be allocated among the various cable television companies operating in the State in proportion to their gross receipts. Section 817 provides, in pertinent part, as follows:

"The Commission shall, at such time or times pursuant to such procedure as it shall determine by regulation, bill and collect from each cable television company the greater of (i) one hundred dollars or (ii) an amount computed by multiplying such total estimated operating expenses of the Commission by a fraction the numerator of which is the gross annual receipts of such cable television company during such twelve month period preceding the date of computation as the Commission shall designate by regulation, and the denominator of which is the total gross annual receipts of all cable television companies operating in the state during such period.

.

"In no event shall the amount billed to or collected from any cable television company pursuant to this section exceed two percent of the gross annual receipts of such company during the twelve month period designated by the Commission."

2/ The Association also filed a Motion to Consolidate its petition with the proceedings in Docket 20272 relative to duplicative three-tier regulation of cable television, arguing that the two proceedings had substantial interrelationship of issues. Inasmuch as the proceedings in Docket 20272 have terminated, the issue is now moot.



The term "gross annual receipts" is defined to include:

"any and all compensation received directly or indirectly by a cable television company from its operations within the state, including but not limited to sums received from subscribers or users in payment for programs received and/or transmitted, advertising and carrier service revenue and any other moneys that constitute income in accordance with the system of accounts approved by the Commission.

"Gross annual receipts shall not include any taxes on services furnished by a cable television company imposed directly on any subscriber or user by any municipality, state, or other governmental unit and collected by the company for such governmental unit."

4. Section 76.31 of the Commission's rules concerns the granting of cable television system franchises by state and local authorities. Paragraph (b) of that section states as follows: 3/

"(b) The franchise fee shall be reasonable (e.g., in the range of 3-5 percent of the franchisee's gross subscriber revenues per year from cable television operations in the community (including all forms of consideration, such as initial lump sum payments)). If the franchise fee exceeds three percent of such revenues, the cable television system shall not receive Commission certification until the reasonableness of the fee is approved by the Commission on showings, by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and, by the franchising authority, that it is appropriate in light of the planned local regulatory program."

In interpreting the term "gross subscriber revenues" as used in this section the Commission has stated that it is meant to include

"only those revenues derived from the supplying of regular subscription service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and origination channels, if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system." Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry, FCC 74-384. 46 FCC 2d 175 [29 RR 2d 1621] (1974).

5. CCT notes that since its creation on January 1, 1973, its expenses have exceeded 1% of the "gross annual receipts" of all systems operating in the

3/ We note that the Commission recently modified §76.31 so as to simplify the procedures for its enforcement. No substantive changes were made. See Report and Order in Docket 20578, FCC 76-448, _____ FCC 2d _____ [37 RR 2d 307] (released May 17, 1976).

State; accordingly, for the year 1974 CCT has issued orders billing every system at the maximum statutory rate of 1% of the systems' "gross annual receipts." Attached to its Petition are copies of CCT's General Order #3 and General Order #4 issued June 7, 1973, and February 25, 1974, respectively, mandating compliance. CCT states that several cable television operators have argued that its orders charging such operators on their "gross annual receipts" are not enforceable in light of §76.31(b) of the Commission's rules, inasmuch as the tax is assessed against "gross receipts" rather than the more narrow base of "gross subscriber revenues." In view of this, CCT notes that Cerracche Television Corp., operator of a cable television system in New York, sought in a class action suit, a judicial declaration in a New York State Court that Section 817 of the New York statute is inconsistent with §76.31(b) of the Commission's rules; and, since §76.31(b) is promulgated pursuant to the Commission's rules; and, since §76.31(b) is promulgated pursuant to the Communications Act of 1934, as amended, the Supremacy Clause of the U.S. Constitution renders Section 817 unenforceable. CCT states that this challenge to its implementing orders was rejected by the state court without discussion of the §76.31(b) argument. ^{4/} In view of this controversy, CCT filed this declaratory ruling petition in order to obtain the Commission's views as to the consistency of the two provisions.

Arguments of Parties

6. CCT argues that Section 817 of Article 28 of the New York statute is consistent with §76.31(b) of the rules. In support of its position, CCT advances three arguments. First, CCT argues that the New York statute permits nothing more than the recoupment of its legitimate regulatory expenses and is thereby consistent with Commission policy and precedent. In support of this argument, CCT cites Paragraph 185 of the Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143 [24 RR 2d 1501] (1972), and Paragraph 93 of the Clarification, *supra*, where the Commission distinguished revenue raising fees from expense recoupment fees, prohibiting the former and permitting the latter. Based on these precedents and policies, CCT argues that inasmuch as Section 817 expressly limits the maximum amount collectible to its actual regulatory expenses, the Section is within Commission precedents. Secondly, while conceding that Section 817 does not describe a system's fee obligation as a percentage of that system's "gross subscriber revenues" as that term is used by the Commission, CCT argues that this fact does not render Section 817 inconsistent with §76.31(b). Citing Paragraph 98 of the Clarification, *supra*, CCT argues that it is clear that no matter what the label attached to the fee, the Commission's policy is to translate the fee into a percentage of gross subscriber revenues. CCT argues that:

^{4/} Cerracche Television Corporation v. Kelly, et al., ___ NYS 2d ___ (Supreme Court, Albany County, November 8, 1974). We are advised by the clerk of the court that judgment was entered on February 6, 1975. On December 11, 1975, the Supreme Court, Appellate Division, Third Department, affirmed the trial court's holding that §76.31(b) was inapplicable to Cerracche inasmuch as Cerracche commenced operation prior to 1972.

"in the normal course of events, the fees authorized by Section 817 are measured not by reference to the gross annual receipts of the cable system, but rather by reference to (CCT's) costs and expenses. 'Gross annual receipts' are used for the purposes of allocating responsibility for the Commission's costs and expenses, but the costs and expenses are the sole determinant of the amount to be recovered. Only when the costs and expenses cannot be recovered in full because of the two percent limitation in Section 817 do the 'gross annual receipts' become relevant in determining the amount to be recovered."

Thirdly, citing Metro Cable, Inc., FCC 74-1294, 49 FCC 2d 1133 [32 RR 2d 57] (1974), CCT argues that the Commission has recently held that a Minnesota statute virtually identical to Section 817 is essentially "self-justifying on its face" since it related to the recoupment of regulatory costs by a comparable state cable television regulatory Commission. While conceding that the term "gross annual receipts" is more narrowly defined in the Minnesota statute than in the New York statute, CCT argues that the significant point is that in neither state may the fees exceed the costs and expenses of the respective agencies. As such, CCT argues that there is no basis for a different conclusion herein. In further reliance on Metro Cable Inc., CCT notes that our decision there authorized the collection of the state's one percent fee plus a three percent fee levied by the franchising municipalities involved, resulting in a combined total franchisee fee of four percent of gross subscriber revenue. In contrast, CCT argues, Section 818 of the New York statute provides that when municipalities impose franchise fees, such fees when added to the state fee may not exceed any applicable federal regulation.^{5/}

7. In its Response to CCT's petition, the Association makes several arguments. First, since the Section 817 fee is assessed against "gross receipts" rather than "gross subscriber revenues," it is said to be inconsistent with §76.31(b) as amplified by the Cable Report and Order, supra, and the Clarification, supra. The Association further notes that in Paragraph 96 of the Clarification, the Commission stated that its policy on franchise fees was designed to promote the development of auxiliary cable services by freeing all funds possible to support such services; and, that the policy expressed in the Clarification reaffirms previous interpretations of the Rules. citing Signal Master, Inc., FCC 73-1344, 44 FCC 2d 860 [29 RR 2d 221] (1973), West Hawaii Cable Vision, Ltd., FCC 74-453, 46 FCC 716 [30 RR 2d 215] (1974), Karlen Communications, Inc., FCC 74-1110, 49 FCC 2d 77 [31 RR 2d 986] (1974), and TelePrompTer of Mountlake Terrace, Inc., FCC 75-107, 51 FCC 2d 199 [32 RR 2d 1137] (1975). The Association argues that the only

^{5/} Section 818 provides in relevant part:

"Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the Commission pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal laws, rules, or regulations."

instance in which the Commission has approved a gross receipts fee involved a tax imposed on all public utilities by the State of Connecticut, citing Coastal Cable TV Co., FCC 74-731, 47 FCC 2d 877 [30 RR 2d 1325] (1974), and that in Coastal, supra, the Commission found it consistent with §76.31(b) inasmuch as (a) no local franchise fee was levied, (b) the state-imposed fee was in lieu of all property taxes, and (c) the net result of (a) and (b) was to lessen the total burden on cable television systems. Absent the three mentioned factors, the Association maintains that the New York fees are not justifiable under Coastal Cable, supra.

8. As to CCT's argument that the gross annual receipts fee should be held consistent with §76.31(b) because the proceeds are used solely to defray CCT's regulatory expenses, the Association and MCTV answer that this alone does not serve to justify a fee based on gross receipts, citing West Hawaii Cable Vision, Ltd., supra. CCT's reliance on the language in Paragraph 98 of the Clarification is inapplicable here, the Association maintains, since it is impossible to translate "gross receipts" into "gross subscriber revenues;" and, further, that Paragraph 98 must be read in context with the preceding paragraphs, especially 95 and 96. MCTV argues that while it may be possible to convert the fee, Paragraph 98 was not intended to support CCT's argument but was addressed to lump sum payments and flat amounts such as filing fees. The Association says that having prohibited fees based on gross receipts in Paragraphs 95 and 96, the Commission did not intend to permit such fees in Paragraph 98.

9. The Association also argues that CCT's attempt to justify its fee because "in the normal course of events" the fee is based on Commission's expenses rather than gross receipts is not acceptable since there is no reasonable basis to conclude that CCT's budget will fall below the applicable percentage of the industry's gross receipts in the foreseeable future. On the contrary, it is argued, that CCT's General Order #4, issued February 25, 1974, estimates the gross receipts of cable television companies in New York for 1972 at \$32,000,000, one percent of which is \$320,000, while CCT's 1975-76 budget is \$750,000. Additionally, the Association notes that Section 817 authorizes CCT to include not only this cost but outstanding costs from the previous fiscal year in assessing its fees. From this the Association concludes that CCT's costs are unlikely to drop below the statutory ceiling level.

10. Finally, the Association and MCTV argue that CCT's reliance on the Commission's decision in Metro Cable, Inc., supra, is misplaced. Contrary to CCT's assertion that Metro Cable, Inc., stands for the proposition that any fee assessed only to recover regulatory expenses is justified, per se, both argue that the fee in Metro Cable, Inc., supra, was justified (1) since it was assessed on the basis of gross subscriber revenue rather than gross receipts and (2) the Commission relied on filings by both the cable system and by the state outlining the regulatory programs and detailing the specific costs of the regulatory programs. In rebuttal to CCT's assertion that Section 817 of the Executive Law makes it clear that local fees when added to the state fee may not exceed applicable federal limitations, the Association argues that Section 817 has not been subject to any interpretation by the courts or by CCT to that effect. Thus, the Association argues, it is not clear whether a cable operator in New York could automatically reduce local franchise fee payments required

by a franchisee to a level so that the local fee plus the state fee equalled no more than the applicable federal limitations. Further, says the Association, the problem is compounded since the Section 817 fee does not enjoy grandfather rights under Commission Rules. Thus, the Association urges the Commission not to rely upon Section 817 as an assurance of compliance with §76.31(b). More importantly, says MCTV, acceptance of CCT's rationale weakens the federal preemption, creating an initial precedent CCT needs to incrementally assert jurisdiction over auxiliary services.

11. In its Reply, CCT reiterates that Section 817 permits only a maximum recovery of CCT's regulatory expenses without any further liability on cable television systems; that the Commission policy is to translate all applicable franchise fees into a percentage of gross subscriber revenues; that the Association's characterization of its fee as a "gross receipts tax" is inaccurate as the true measure of its fee, except in circumstances where the percentage ceiling comes into play in which event the fees assessed are less than CCT's actual expenses.

12. In a Supplement to its response, the Association notes several recent developments and reiterates some previous arguments. The Association states that during the pendency of this matter, CCT commenced legal proceedings in the New York State courts against several of its members to collect the Section 817 fee, inconsistent with CCT's action in submitting this Petition which implicitly recognizes the questionable status of Section 817 under §76.31(b) of the rules. ^{6/} The second development noted by the Association is the Commission's release of its First Report and Order in Docket 19554, FCC 75-369, 52 FCC 2d 1 [33 RR 2d 367] (1975), in which the Commission preempted all local regulation of pay cablecasting. It is argued that this development is pertinent in that Home Box Office, Inc., a New York supplier of pay cable programming, has announced its intention to deliver its programming via satellite to several New York cable television operators, and that these developments highlight the fact that the fee assessed against pay cable revenues by CCT has a major and immediate adverse effect on the ability of cable operators to effectuate the federal regulatory objectives embodied in the Commission's preemption. The Association maintains that there is a clear conflict on the face of Section 817 in its imposition of a fee on "gross receipts" rather than "gross subscriber revenues," and, as such, the Association again urges the Commission to strictly apply its policy of exclusion of auxiliary services from local/state fees.

13. The Association also argues that CCT's petition does not go far enough. It is maintained that some doubt exists as to the impact of the Section 817 fee and §76.31(b) limits on cable operators who operate under grandfathered municipal franchises that are subject to state/local fees in excess of 3% and, oftentimes in excess of 5%. The difficulty presented, the Association says, is the absence of a procedural mechanism to secure federally vested rights to protect against burdensome state and local fees. More specifically, the Association maintains that as interpreted by CCT, cable operators are obligated to pay the statutory ceiling to CCT, regardless of whether the combined state and local fees exceed 3%, without the benefit of the requisite

^{6/} MCTV notes that it is one of those operators sued by CCT. MCTV advises that in February 1976, it obtained a stay of CCT's collection action in New York State courts pending a Commission decision on this petition.

showing, or 5%, which is beyond what is considered permissible by §76.31(b). Further, the Association argues that New York municipalities with vested grandfathered franchises deny the applicability of federal law to the franchise fee provisions prior to March 31, 1977. Given that the State of New York did not enact Article 28 until after the Commission's promulgation of the Cable Television Report and Order, *supra*, the Association argues that any fee imposed pursuant to Article 28 is clearly not grandfathered, and therefore any such fee must be in strict compliance.

14. Relative to combined fees in excess of 3%, MCTV makes three additional points. First, citing Metro Cable, *supra*, and Clearview, *supra*, it is argued that Commission approval of fees beyond 3% requires the affirmative adjudicatory participation of each affected cable system to assure that such systems are not adversely affected economically. To exclude the individual cable system, MCTV argues, deprives those systems and their local regulators of their due process rights to a fair and full hearing. Secondly, MCTV maintains that the Commission has ignored the existence of the state fee in its processing of applications for certificates of compliance, for new cable television systems in New York, inconsistent with Commission policy and precedents. Thus, MCTV asks the Commission to declare that its silence does not constitute its approval as to the New York fee for both post-1972 certificated systems and grandfathered systems. Thirdly, MCTV argues that the Commission's approval of combined fees in excess of 5% of gross subscriber revenues would have the effect of retroactively approving the situation, contravening Commission precedents. As indicative of its point MCTV maintains that since it has already paid part of the CCT fee, the effect of Commission approval, in conjunction with the supremacy provision of Section 818 and the fact that MCTV has already paid the franchising authority 5% of its gross receipts, would require MCTV to remit additional moneys to CCT for the last three years. MCTV says it would then be retroactively required to pay 7% of gross revenues which is in excess of the 5% limitations. MCTV submits an exhibit showing that the aggregate taxes and fees for which it has fixed and contingent liability for 1976 is a "staggering \$2,946,000 or 21.4%" of its gross revenues. Thus, MCTV asks the Commission to require CCT to file new petitions directed at each grandfathered system where the combined fees exceed 3% of basic revenues and then to solicit evidence of the impact of the respective fees upon the individual cable systems.

Discussion and Resolution

15. It appears to us that three questions require discussion.

(a) Is Section 817 of the New York Executive Law consistent with §76.31(b) of the rules insofar as the state fee is assessed upon "gross annual receipts" rather than "gross [annual] subscriber revenues"? We have concluded that the two provisions are consistent.

(b) Is Section 817 of the New York Executive Law consistent with §76.31(b) of the rules insofar as the state fee when combined with an applicable municipal fee compels cable operators to pay in excess of 3% of their total gross subscriber revenues without a special showing? We have concluded that a special showing is required. Further, we find that New York has satisfied that showing.

NEW YORK STATE COMMISSION ON CABLE TELEVISION



(c) Is Section 817 of the New York Executive Law consistent with §76.31(b) of the rules insofar as the state fee when combined with an applicable grandfathered municipal fee exceeds 5% of total gross subscriber revenues? We have concluded it is not.

16. Question (a). We have addressed the question of "gross receipts" vs "gross subscriber revenues" before. In the Cable Television Report and Order, *supra*, we stated:

"185. Franchise fee. While we have decided against adopting a two percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have extracted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about five or six percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments. We are seeking to strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation. . . .

"186. . . . It is our judgment that maximum franchise fees should be between three and five percent of gross subscriber revenues. But we believe it more appropriate to specify this percentage range as a general standard, for specific local application. When the fee is in excess of three percent (including all forms of consideration, such as initial lump sum payments), the franchising authority is required to submit a showing that the specified fee is appropriate in light of the planned local regulatory program, and the franchisee must demonstrate that the fee will not interfere with its ability to meet the obligations imposed by our rules."

And subsequently in the Clarification, *supra*, we stated:

"GROSS SUBSCRIBER REVENUES

"95. The term 'gross subscriber revenues' is meant to include only those revenues derived from the supplying of regular subscriber service, that is, the installation fees, disconnect and reconnect fees, and fees for regular cable benefits including the transmission of broadcast signals and access and origination channels, if any. It does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system.

"FEES FROM AUXILIARY SERVICES

"96. We recognize that the income derived from auxiliary cable services may at some future time constitute the bulk of a cable system's receipts. We have no intention of depriving the franchising authority of a reasonable percentage of those receipts at that time. But for now the moneys derived from ancillary services are best used to support the development of those experimental and largely unprofitable services. We encourage experimentation in ancillary services. Any funds that can be freed to support those services will ultimately benefit the community of the system and aid our efforts at seeing these services develop nationwide. . . .

.
"98. . . . There have been several cases where a franchise fee was based on something other than gross subscriber revenues. Generally, such instances arise when the fee is based on a specific monetary figure per year per subscriber. . . . Regardless of how the fee is stated, however, we will attempt to translate the fee into a percentage of gross subscriber revenues to see if it reasonably complies with our rules."

16. Given the above, our basic policy is clear - state and/or local franchise fees assessed on any basis broader than "gross subscriber fees" are permissible so long as the fee payable may be translated into a percentage of gross subscriber revenues and that percentage does not exceed the three to five percent range.

17. Each of the arguments, save one, *infra*, we have previously considered and rejected. See Clarification, *supra*. The only new argument advanced is that CCT is attempting to do indirectly what it cannot do directly, i.e., regulate auxiliary services. We are unpersuaded. On the contrary, CCT has recently directly and explicitly asserted jurisdiction over auxiliary services. See Clarification of Commission Policy issued March 1, 1976. ^{7/} Thus, CCT's computation of its fees based on the broader base of total "gross receipts" does not render that fee inconsistent with §76.31(b) inasmuch as it is possible for a cable operator to make an arithmetic computation translating a fraction of that fee into a percentage of gross subscriber revenues. While it may be more difficult to translate the state fee into gross subscriber revenue where CCT has not billed at the maximum rate permitted, i.e., 2% of gross receipts, that computation is not impossible. In any event, as the Association concedes, it is unlikely that CCT's budget will fall below 2% of industry's receipts in the foreseeable future. As such, CCT will continue to bill at the maximum rate of 2% of total gross receipts which is easily translated into gross subscriber revenues. So long as the total fee paid to the State and its political subdivisions does not exceed 5% of gross subscriber revenue, the fact that

^{7/} That action by CCT has now been challenged in federal court. See *Brookhaven Cable TV Inc., et al. v. Kelley, et al.*, Civil No. 76 CV 154 (NDNY) filed April 8, 1976, and this Commission has moved to intervene.



part of the fee is calculated on subscriber revenues and another part on gross revenues is not determinative. So long as the 5% maximum is not exceeded, the method of assessment is a matter for resolution by the State.

18. Question(b). Citing Clearview, supra, and Metro Cable, Inc., supra, CCT argues that Section 817 is not a general state revenue-raising device but a provision that allows it only to recoup its actual regulatory costs. As such, CCT argues that it is consistent with Commission precedents. While it is true the Commission has found consistent with §76.31(b) state schemes that allow the reimbursement of regulatory costs, those costs are still subject to the special showing and percentage limitations of §76.31(b). Thus, where the imposition of a state fee in addition to a municipal fee produces a total fee in excess of 3% of the cable system's gross subscriber revenues, a special showing is required. We note that New York has enacted a comprehensive law for the regulation of cable television within the state charging CCT with administration of that law. ^{8/} Thus, consistent with our action in Clearview, supra, and Metro Cable, supra, we find the New York statute constitutes substantial justification for imposition of a combined state-local fee up to a maximum of 5% of total gross subscriber revenues. We will not require any further showings by the State of New York involving applicants for certificates of compliance for New York cable television systems.

19. The rules also provide for a showing by the cable television operator in order for fees above three percent to be considered justified. The rules anticipated that such showings, both by the operator and the state or local regulatory authorities, would be made and considered in the certificate of compliance process. Because of the manner in which the New York State fee was imposed we believe it preferable to require that showings by New York cable operators that the fee would "interfere with the effectuation of federal regulatory goals in the field of cable television" be made through the special relief procedures specified in §76.7 of the rules. The only alternative to this would appear to be a requirement that the new fees be considered as terminating all existing franchises in the state, triggering the recertification process. Because, at the time the rules were adopted, major attention was focused on the more typical regulatory situation where fees were established in each community separately, it appeared reasonable to require that any substantial change in the franchise trigger both the requirement that a new certificate of compliance be obtained and the amendment of the franchise to bring it into full compliance with the franchise standards of §76.31 of the Commission's rules. The New York situation does not fit comfortably within this structure since the basic franchise document is issued at the local level and the fee is imposed at the state level. Accordingly, it appears more appropriate not to require wholesale recertification when the special relief provisions provide a more expeditious and discrete means of considering the narrow issue raised by a cable operator's showing under §76.31(b). The substance of the decision-making process before the Commission will not be altered in any way, except that if

^{8/} Section 811 of the New York statute declares the legislative intent to develop a state-wide telecommunications policy, promote the development of cable television, and assure that cable companies provide adequate, efficient and economic service to the public. Additionally, Section 815 specifies eleven broad supervisory, investigatory and promotional duties of CCT.

no cable operator showing is received, we will presume that the additional fee is not such as to bring into doubt his ability to comply with federal rules.

20. Question (c). We have indicated that we include all non-federal regulatory fees, both state and local, in determining compliance with §76.31(b). Moreover, because the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the §76.31(b) limitation until March 31, 1977, as are fees imposed at an earlier date.

21. MCTV and the Association have noted two groups of New York cable operators who may be put in the position of violating §76.31(b) through payment of the fee imposed by CCT. The first group is those operators for whom imposition of the state fee will cause the combined state-local fee to exceed 5% of their gross annual subscriber revenues. The second group is those operators who have grandfathered fees that are currently in excess of 5% of their gross annual subscriber revenues. Again, we state our belief that fees in excess of 5% are an unreasonable interference with federal regulatory goals for the development of a nationwide cable communication industry. We have accepted grandfathered fees in excess of 5% only until March 31, 1977, to allow a reasonable transition period. The imposition of additional burdens on top of an already burdensome situation is unacceptable. Thus, as to cable systems within either of these two groups, the imposition of the state fee in addition to the local fee would be inconsistent with §76.31(b). That is, if an existing fee is 5% or more, an increase in overall fee payments would not be consistent with §76.31(b). In view of the justification accepted herein, if existing fees are increased by the addition of the state fee, this is acceptable as long as the 5% limit is not exceeded. We note that Section 818 of the New York Law 9/, as construed by the CCT, would seem to have taken into account the possibility of such a conflict with federal limitations and to have resolved it in such a manner that the combined state and local fees will not exceed the requirements of §76.31. CCT indicates that Section 818 makes clear that those fees charged by local governments, when added to the state fee, may not exceed the applicable federal limitations. Accordingly, the fact that both state and local fees will be levied does not render the state fee inconsistent with our rules. While the Association indicates that other interpretations of Section 818 than that set forth by CCT are possible and the full meaning of the section has not been judicially resolved, for purposes of this opinion we have assumed the correctness of the CCT construction. If there is a dispute as to the meaning of this section, it can only be resolved by the New York courts. And if the CCT reading turns out to be incorrect then this opinion will have to be revised in light of any different interpretation.

Accordingly, it is ordered, that the "Petition for Declaratory Ruling" filed January 24, 1975, by the Commission on Cable Television of the State of New York is granted, to the extent indicated herein and otherwise denied.

9/ Section 818 of the New York Law which accomplishes this is quoted in full at footnote 3, supra.

DISSENTING STATEMENT OF
COMMISSIONER JAMES H. QUELLO

I dissent to the action of the majority since I believe the expression of "basic policy" set forth in the Declaratory Ruling may have been precipitate. In my opinion, we should have instituted a rule making proceeding in order to obtain comments from the cable industry and other interested parties since we have now in effect amended §76.31(b) by adoption of this ruling.

Section 76.31(b) provides in essence for a franchise fee limitation of from 3 to 5% of the franchisee's gross subscriber annual revenues from cable television operations. In interpreting "gross subscriber revenues" as used in this section, the Commission has stated that it is meant to include only those revenues derived from regular subscription service, but does not include revenues derived from per-program or per-channel charges, leased channel revenues, advertising revenues, or any other income derived from the system. See Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry, FCC 74-384, 46 FCC 2d 175 (1974). The majority now states that our basic policy is that state and/or local franchise fees assessed on any basis broader than "gross subscriber fees" are permissible so long as the fee payable may be translated into a percentage of gross subscriber revenues and that percentage does not exceed the 3 to 5% range. This does not square with the express language of §76.31(b) and, in my opinion, constitutes an amendment of this rule.

I recognize that our new "basic policy" will not cost the cable operator any more than a maximum of 5% of his gross subscriber revenue figure. However, I note that Article 28 of the New York State Executive Law provides that the Commission on Cable Television of the State of New York (CCT) shall collect from each cable system an amount determined by formula, not to exceed 2% of the gross receipts of such system during the year. Section 28 also provides that any municipality may impose on a cable system an assessment which, when added to the amount payable to the CCT, does not exceed the maximum amount permitted by applicable federal laws, rules or regulations. Thus, CCT has priority in assessment of franchise fees.

My concern here is that the assessment by CCT of a franchise fee on gross receipts of a cable system which provides a pay-cable service, leased channels, and possibly carries some advertising, with concomitant higher gross revenues, may result in a "due bill" to CCT substantially greater than the 3% (or whatever percentage) franchise fee which the system heretofore has paid its local franchising authority. In such cases the local franchise fee obviously must be reduced in accordance with the provisions of Article 28 of the New York State Executive Law, but in probable violation of the terms of the local franchise. Thus, I foresee problems for the cable operator and his local franchising authority. I recognize this is not a matter of Federal concern; nevertheless, I believe our new "basic policy" may create more problems than it solves. In my opinion this aspect should have been the subject for comment by the industry generally, since our Declaratory Ruling of this date establishes precedent for other similar state franchise assessment provisions, and may result in substantial nationwide impact in the future.

In the Clarification document of 1974, supra, we stated in paragraph 97 thereof that, "Because we are presently imposing a 'gross subscriber revenues' limit on franchise fees which may at some future date be lifted, we suggest that franchising authorities write their franchise fee provision flexibly, that is, using a 'gross subscriber revenues' base for now but including a provision for the base to change to 'gross revenues' automatically in the event that this Commission changes its rules." In my opinion, the majority has today amended the essence of §76.31(b) without an appropriate rule making procedure and without affording due process to the cable industry, state and local franchising authorities, and other interested parties.

Accordingly, I must dissent.

FCC 76-613
41368

In the Matter of)

NEIL D. FRIEDMAN)

On Request for Inspection of Records)

FOIA Control No. 6-45

Adopted: June 29, 1976

Released: July 8, 1976

[§25:3, §50:461] Inspection of records.

On review, the Commission releases obsolete questions used in prior Amateur Radio Service operator examinations. However, the Freedom of Information Act does not require release of any past or present examinations in toto. Disclosure of the examinations would significantly harm governmental interests in that the Commission's testing methods would be seriously undermined and the public interest disserved. Release of the old examinations would make a mockery of the present examinations. Neil D. Friedman, 37 RR 2d 1158 [1976].

MEMORANDUM OPINION AND ORDER

By the Commission:

1. The Commission has before it for consideration: (a) the ruling of April 22, 1976, entered by the Chief, Safety and Special Radio Services Bureau and the General Counsel denying the request for inspection of records filed under the provisions of the Freedom of Information Act, 5 USC §552, by Neil D. Friedman; and (b) an application for review of that decision timely filed by Friedman pursuant to §0.461(i) of the Commission's Rules (47 CFR §0.461(i)).

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

FCC 77-98

43907

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In re:)
NEW YORK STATE COMMISSION ON CABLE TELEVISION) CSR-654
Petition for Reconsideration)

Declaratory Ruling

Adopted: February 3, 1977;

Released: February 16, 1977

By the Commission: Commissioner Lee absent; Commissioners Guello and White concurring and issuing statements.

1. The New York State Commission on Cable Television has filed a petition requesting reconsideration of a portion of the declaratory ruling in New York State Commission on Cable Television, FCC 76-599, 59 FCC 2d 1344 (1976). Oppositions have been filed by Manhattan Cable Television, Inc., and the New York Cable Television Association.

2. At issue in the subject decision was whether Section 817 of Article 28 of the New York State Executive Law which authorizes the Commission on Cable Television of the State of New York to collect a fee from the New York cable television industry was consistent with Section 76.31(b) of our Rules. We addressed three questions:

- (a) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee is assessed upon "gross annual receipts" rather than "gross [annual] subscriber revenues"? We have concluded that the two provisions are consistent.
- (b) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee when combined with an applicable municipal fee compels cable operators to pay in excess of 3% of their total gross subscriber revenues without a special showing? We have concluded that a special showing is required. Further, we find that New York has satisfied that showing.

- (c) Is Section 817 of the New York Executive Law consistent with Section 76.31(b) of the Rules insofar as the state fee when combined with an applicable grandfathered municipal fee exceeds 5% of total gross subscriber revenues? We have concluded it is not.

59 FCC 2d at 1350-51.

3. Petitioner seeks reconsideration of that portion of the Commission's decision in "(c)" above, contending that this holding is based upon erroneous findings of fact and conclusions of law. Petitioner also states that it was not able to fully discuss this issue since it was raised by the parties opposing its original petition and was secondary to the issues raised in the original petition. Responding to the procedural point, the opposition pleadings contend that petitioner had ample opportunity to comment on such issues in the earlier proceeding prior to issuance of the declaratory ruling, but chose not to do so. Section 1.106(c) of the Rules specifies the circumstances in which petitions for reconsideration should be considered. While petitioner has not shown any change in circumstances nor any previously unavailable facts since its last opportunity to present such matters, we believe the public interest requires a reexamination of the issues which are raised, and a clarification of our previous holding. 1/

4. The primary issue here is the meaning of Section 76.31(b) of the Commission's Rules as it applies to cable television systems in operation prior to March 31, 1972. Section 76.31(b) provides:

Franchise fees shall be no more than
3 percent of the franchisee's gross sub-
scriber revenues per year from cable
television operations in the community
(including all forms of consideration,

1/ See Section 1.106(c) of the Commission's Rules.

such as initial lump sum payments). If the franchise fee is in the range of 3 to 5 percent of such revenues, the fee shall be approved by the Commission if reasonable upon showings: (i) by the franchisee, that it will not interfere with the effectuation of federal regulatory goals in the field of cable television, and (ii) by the franchising authority, that it is appropriate in light of the planned local regulatory program. With respect to a cable television system that was in operation prior to March 31, 1972, the provisions of this paragraph shall not be effective until the end of a system's current franchise period, or March 31, 1977, whichever occurs first. 2/

The Commission is asked to reconsider its position regarding the applicability of the provision during the 1972 to 1977 3/ period. Specifically, would an increase between those dates in the total fee levied on an existing cable television system be proscribed by the rule where such an increase is beyond the limits specified in the provision and is due to a change in the fee levied by a state agency rather than by a local franchising authority?

5. In its earlier ruling, the Commission stated: "[B] ecause the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation

2/ The present wording of Section 76.31(b) which appears above differs somewhat from that quoted in the declaratory ruling, but the change does not affect the matters at issue here. The new wording was effective June 24, 1976. Report and Order in Docket 20578, FCC 76-448, 59 FCC 2d 378 (1976). 2.

3/ On November 17, 1976, the Commission stayed the date for submitting a compliant franchise until March 31, 1978. See para. 36, Notice of Proposed Rulemaking in Docket 21002, FCC 76-1070, FCC 2d (1976). We do not believe this inquiry into the filing requirements (Section 76.13) and franchise standards (Section 76.31) bears on the instant proceeding.

until March 31, 1977, as are fees imposed at an earlier date." 4/

Petitioner argues that this is an erroneous conclusion, because Section 76.31(b) grandfathers cable television systems, and not any fees or assessments. 5/ Petitioner also states that the Commission had no means of enforcing any provisions which grandfathered fees, because existing cable television systems were not obliged to even seek Commission certification until 1977 or the expiration of their franchises. The opposition pleadings argue that pre-March 31, 1972, franchise fees were grandfathered. They argue that Section 76.31(b) grandfathers each particular aspect of an existing cable system's operations and franchise, and that the last sentence of Section 76.31(b) grandfathers franchise fee provisions. 6/ They contend that the Commission "did not mean to bless the subsequent creation of new inconsistencies with its guidelines."

4/ Para. 21, New York State Commission on Cable Television, FCC 76-599, 59 FCC 2d 1344, 1353 (1976).

5/ Also, petitioner argues that its interpretation is consistent with the Commission's purpose and intent which was to avoid the creation of new problems of conflicting regulation during the interim period, as reflected both in the Letter of Intent, FCC 71-787, 31 FCC 2d 115 (August 5, 1971), App. C, Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143, 260 (1972), and in paragraph 187 of the Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143, 210 (1972):

Grandfathering. The grandfathering provisions of our rules with respect to franchise standards seek to achieve a large measure of flexibility. An existing cable system will be required to certify within five years of the effective date of these rules or on renewal of its franchise, whichever comes first, that its franchise meets the requirements of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause.

6/ It is argued that such an interpretation is consistent with previous cases, citing Commonwealth Cable TV Co., Inc. (Philadelphia, Pennsylvania), FCC 75-167, 51 FCC 2d 448, 449 (1975), and CATV of Rockford, Inc. (Rockford, Illinois),

6. At paragraph 22 of our declaratory ruling, 59 FCC 2d at 1353, we considered the effects of the state fee on two groups of New York cable operators: first, those whose local franchises call for a fee at or below the federal maximum of 3 to 5 percent, but for whom addition of the state fee would cause the appropriate limit of 5 percent to be exceeded; second, those operators whose payments to local franchising authorities--- having been established prior to March 31, 1972---are permitted to exceed the 3 to 5 percent federal maximum until the arrival of a date for strict franchise compliance (originally March 31, 1977; but see note 3, supra). We are asked to consider again whether any excess caused by the state fee, imposed after 1972, is to be permitted.

7. We originally answered that "because the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation until March 31, 1977, as are fees imposed at an earlier date." 59 FCC 2d at 1353. (emphasis supplied). CCT claims that the effect of this is to grandfather a particular pre-1972 fee, raising a conflict with the grandfathering provision of Section 76.31(b) since the latter is addressed not to a fee but to the system. Thus, says petitioner, "even the imposition of new and higher fees imposed on

6/ (Continued)

FCC 72-1005, 38 FCC 2d 10, 15 (1972). The opposition states that the purpose of the provision was not that cited by petitioner (see footnote 5), but was only "to avoid, during the interim period, conflicts between pre-existing local regulations and the new federal regulations in those instances where an existing franchise already contains fee provisions in excess of the new franchise guidelines."

'grandfathered' cable television systems during the interim period should be considered acceptable" (Pet., p. 11). Reading the grandfathering provision of Section 76.31(b) in light of the 1972 Cable Television Report and Order which adopted it, we find no specific application of the concept to fees but only a general concern to avoid "minor dislocations." 36 FCC 2d 143, 210. However, in reconsideration of the Report and Order, we stressed the equities involved in a cable operator's justifiable reliance on specific franchise terms negotiated before he was placed on notice of the contents of the 1972 Commission decision. For example:

Therefore, we are modifying the rule so that franchises granted prior to March 31, 1972, will be processed even though they do not meet all the requirements of our new rules so long as there is substantial compliance. For instance, the delay attendant to renegotiation of a franchise requiring a 6% franchise fee would do more of a disservice to the public . . . than would the fee itself Further, any system that, in reliance on the existing franchise, has made a significant financial investment or entered into binding contractual agreements prior to the effective date of the rules but was not operational by that date, may request that its inconsistent franchise be grandfathered until March 31, 1977

36 FCC 2d at 366 (emphasis supplied). Admittedly, these statements were addressed to a discrete class of quasi-grandfathered systems, franchised but not operating prior to March 31, 1972, for whom the grace period would not be automatic but would be granted if "substantial compliance" were shown or criteria for special relief met. But the common factor for both grandfathered and quasi-grandfathered systems is a franchise negotiated prior to the effective date of the 1972 rules, for which our common concern---as expressed in the underlined passages---was to let specific franchise terms, justifiably relied

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upon by the parties, continue in effect during the 1972 to 1977 interim period. That equitable concept would be destroyed if, taking petitioner's view, the franchise fee were free to rise indiscriminately beyond its pre-1972 contract level. 7/

8. Nor can petitioner's interpretation withstand our 1974 Clarification of Rules where, at paragraphs 75 and 76, we stated that an increase in franchise fee would be deemed a "significant amendment" to a franchise---requiring either recertification (if a certificate based on the old fee already had been issued) or initial certification if the cable system had not yet applied. Since the result of such new or renewal certification "would automatically end any 'grandfathering' rights," CCT's claimed freedom to raise the fees of a grandfathered system is made a nullity. 46 FCC 2d 175, 196-97. Under the interpretation in our declaratory ruling, however, there is an applicable fee limit for each grandfathered and quasi-grandfathered system. It is that fee agreed to by the parties in their pre-1972 franchise negotiations. Since, as we ruled, the combined local and state fees may not exceed the grandfathered fee, the state's post-1972 assessment is not an

7/ Since the issuance of the declaratory ruling under petition here, we have adopted a Notice of Proposed Rulemaking in Docket 21002 (note 3, supra). There, at paragraph 37, we acknowledged that---because the Commission would not require the filing of franchises during the pendency of the rulemaking---franchise fee increases could occur without our being able to review such actions. Accordingly, we urged all parties to assist our efforts to maintain the status quo during the relatively brief interim period of the rulemaking, in which we are examining not only the franchise fee limit but all other federal franchise standards contained in Section 76.31 of the Rules.

increase in overall amount of the fee but a revised apportionment to the two governmental authorities involved. Thus, the amendment is not of federal significance and does not trigger new or renewed certification. 8/

9. Paragraph 22 of our original opinion inadvertently caused some confusion in i's statement that

if existing fees are increased by the addition of a state fee, this is acceptable as long as the 5% limit is not exceeded.

59 FCC 2d at 1353 (emphasis supplied). As we made plain earlier in that paragraph, because of grandfathering not all systems will have a 5 percent limit during the grandfathered period. For them, the limit is represented by the grandfathered (pre-1972) local assessment. If that happens to be 6 percent, to repeat the earlier example, then the state's fee must be collected in such a way that the combined state and local assessments do not exceed 6 percent of a system's regular subscriber revenues. In light of the above, we are granting CCT's petition for reconsideration to the extent of accepting as correct the following statement from page 18 of its pleading:

If Section 818 of the New York Law does incorporate a "grandfathering" concept, then the imposition of a State assessment upon a cable system already subject to a "grandfathered" 6% municipal fee would be acceptable so long as the system did not . . . have to pay more than a total of 6% to the State and the municipality. (Footnote omitted)

8/ Nor do we believe that fee increases that take place wholly within the range of zero to 3 percent---or zero to 5 percent, if justified for the latter figure---are of federal significance. For example, an increase from 1 percent of gross subscriber revenues to 3 percent or, if justified, 5 percent of gross subscriber revenues would not be such as to trigger certification or recertification under the Clarification of Rules, supra.

10. Petitioner also makes an alternative argument, presented in response to a question it poses, to wit: Where the combined fee levied by state and local government authorities would exceed the limits of Section 76.31(b), how is the permissible fee to be divided between the two governmental bodies? Which government imposition must give way to the other, and in what manner? Petitioner contends that the Commission's decision made an unwarranted reliance on one possible interpretation of a state law and that the Commission thereby attempted to resolve the manner in which such a fee would be divided between the state and local governments. 9/

11. We should restate our position in this regard. In the declaratory ruling we were attempting to indicate that one plausible interpretation of the New York Law would not appear to be inconsistent with our Rules. Nevertheless, we should repeat that the interpretation of state

9/ In Paragraph 22 the Commission stated:

We note that Section 818 of the New York Law, as construed by the CCT, would seem to have taken into account the possibility of such a conflict with federal limitations and to have resolved it in such a manner that the combined state and local fees will not exceed the requirements of Section 76.31. CCT indicates that Section 818 makes clear that those fees charged by local governments, when added to the state fee, may not exceed the applicable federal limitations. Accordingly, the fact that both state and local fees will be levied does not render the state fee inconsistent with our rules. While the Association indicates that other interpretations of Section 818 than that set forth by CCT are possible and the full meaning of the section has not been judicially resolved, for purposes of this opinion we have assumed the correctness of the CCT construction. If there is a dispute as to the meaning of this section, it can only be resolved by the New York courts. And if the CCT reading turns out to be incorrect then this opinion will have to be revised in light of any different interpretation.

law is for the state courts to resolve. The apportionment of the permissible fee between the state and local governments is a matter for the New York courts. Additionally, although we previously stated that our opinion might have to be revised in light of another interpretation of the state law by the state court, it would not appear that any interpretation would affect our holding herein.

In view of the foregoing, a partial grant of the petition for reconsideration as indicated above would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Reconsideration" filed by the New York State Commission on Cable Television IS GRANTED to the extent indicated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Vincent J. Mullins
Secretary

Concurring Statement of Commissioner James H. Quello
In Re: Limitations on State-Local Franchise Fees

I dissented to the Commission's declaratory ruling relative to limitations on state-local franchise fees, adopted June 24, 1976. 59 FCC 2nd 1344, 1354. I continue to be of the view expressed in that dissent with respect to the overall matter. However, recognizing the adoption of a Commission policy declaration, I must concur with the reasoning expressed in this subsequent declaratory ruling.

Concurring Statement of Commissioner Margita E. White
In Re: Limitations on State-Local Franchise Fees

I concur in the result of this order but differ somewhat in the rationale for achieving that result. I disagree that paragraphs 75 and 76 of the Clarification alone supply an adequate basis for the instant action. The proper basis for this decision, I believe, lies in paragraph 99 of the Clarification, where the Commission declared that "both local franchise fees and state fees, if any, will be added together to determine compliance with our fee limitations." 46 FCC2d at 202. I read that paragraph to apply to both grandfathered and nongrandfathered systems. Thus, the fee existing at the time of the effective date of the 1972 Cable Rules was grandfathered, but the clarification specifically stated that fee level (grandfathered or otherwise) would be looked at as a total figure with regard to any limitation. Where a state level fee would increase a local fee beyond the 5% limit, it would not be permitted beyond 5% or the existing grandfathered fee level. The question of whether the state fee is a "significant amendment" is supportive but essentially irrelevant.

TO: The Commission

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) CSR-654
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This petition is submitted pursuant to Section 1.106 of the Commission's Rules, and, more specifically, alleges:

that this is a request for reconsideration of a final Commission action (Section 1.106(a)(1);

that the petitioner was a party to the above-captioned proceeding and that its interests were adversely affected by the above-referenced Declaratory Ruling, to the extent indicated below (Section 1.106(b));

that the Commission reached certain erroneous findings of fact and certain erroneous conclusions of law in said Declaratory Ruling, more specifically set forth below (Section 1.106(d)(1));

that the instant petition states with particularity and specificity the respect in which the petitioner believes the action taken by the Commission should be changed and the forms of relief sought (Sections 1.106(d)(2) and (3);

and

that the instant petition has been filed within 30 days of the release of the above-referenced Declaratory Ruling (Section 1.106(f)).

The above-captioned proceeding was initiated by the petitioner, CCT, on January 23, 1975, with a request for a Commission ruling regarding the extent to which CCT's system of annual allocation and collection of its operating expenses, pursuant to Article 28, Section 817, of the New York State Executive Law,* was consistent with the provisions of Section 76.31(b) of the Commission's Rules. Two additional parties filed pleadings in this proceeding; the New York State Cable

* Section 817 of the New York State Executive Law provides as follows:

1. All costs and expenses of the commission shall be paid pursuant to appropriation in the first instance from the state treasury, on the certification of the chairman of the commission and upon the audit and warrant of the comptroller. The state treasury
[Footnote continued on next page]

Television Association ("Association") and Manhattan Cable

Television, Inc. ("MCTV"). On June 24, 1976, the Commission

adopted the above-referenced Declaratory Ruling, making three

[Footnote continued from previous page]

shall be reimbursed therefor by payments to be made thereto from moneys collected pursuant to this article.

2. On or before May first of each year, the commission shall estimate the total costs and expenses necessary to operate and administer the commission for the current state fiscal year, including the repayment of any first instance appropriations outstanding on March thirty-first immediately preceding such fiscal year. The commission shall, at such time or times and pursuant to such procedure as it shall determine by regulation, bill and collect from each cable television company the greater of (i) one hundred dollars or (ii) an amount computed by multiplying such total estimated operating expenses of the commission by a fraction the numerator of which is the gross annual receipts of such cable television company during such twelve month period preceding the date of computation as the commission shall designate by regulation, and the denominator of which is the total gross annual receipts of all cable television companies operating in the state during such period. A cable television company may elect to make partial payments equal to one quarter of the total amount billed June thirtieth, September thirtieth, December thirty-first and March tenth of the fiscal year to which the billing relates. On or before September fifteenth of each year, the commission shall compute the actual costs and expenses of the commission for the preceding state fiscal year and shall, on or before October fifteenth of such year, send to each cable television company a statement setting forth the amount due and payable by, or the amount standing to the credit of, such cable television company computed on the basis of the above stated formula, except that for the purposes of such computation the fraction shall be multiplied against the total actual operating expenses of the commission for such fiscal year. Any amount owing by any cable television company shall be payable not later than thirty days following the date of such statement. Any amount standing to the credit of any cable television company shall be applied as a credit against any succeeding payment due. In no event shall the amount billed to or collected from any cable television company pursuant to this section exceed two percent of the gross annual receipts of such company during the twelve month period designated by the commission.

basic holdings, as follows:*

(a) Section 817 of the New York Executive Law is consistent with Section 76.31(b) of the Commission's Rules insofar as the State fee is assessed upon "gross annual receipts" rather than "gross [annual] subscriber revenues."

(b) New York has satisfied the special showing necessary to conclude that Section 817 of the New York Executive Law is consistent with Section 76.31 (b) of the Commission's Rules insofar as the State fee, when combined with an applicable municipal fee, compels cable operators to pay in excess of 3% of their total gross subscriber revenues.

(c) Section 817 of the New York Executive Law is not consistent with Section 76.31(b) of the Commission's Rules insofar as the State fee, when combined with an applicable grandfathered municipal fee, exceeds 5% of total gross subscriber revenues.

CCT hereby requests reconsideration of only that portion of the Commission's Declaratory Ruling relating to its holding in (c) above.

The interests of CCT were adversely affected by the Commission's holdings in two respects:

In the first respect, the Commission has indicated that, with regard to the basic enforceability of CCT's 2% assessment against those cable television systems in New York that are fully

* See paragraph 15 of the Commission's Declaratory Ruling, supra.

subject to the provisions of Section 76.31(b), CCT may only collect so much of its 2% assessment as remains consistent with the Commission's limit of 5% of "gross subscriber revenues", as defined by the Commission.* This would mean that at some point in the future, particularly with respect to a cable television system with a high proportion of revenues from "pay cable" sources, CCT may not be able to collect its 2% assessment in a manner that is consistent with Section 76.31(b) of the Rules.

CCT has decided not to seek reconsideration of this ruling at this time. This decision is based in large part upon the Commission's reassuring language at paragraph 96 of the Clarification of Cable Television Rules and Notice of Proposed Rule Making and Inquiry, FCC 74-384, 46 FCC 2d 175 (1974), which language was reiterated at paragraph 16 of the subject Declaratory

* See paragraph 17 of the Declaratory Ruling, supra.

Ruling, supra:

We recognize that the income derived from ancillary cable services may at some future time constitute the bulk of a cable system's receipts. We have no intention of depriving the franchising authority of a reasonable percentage of those receipts at that time. . . .

CCT also wishes to stress that it reserves its rights to challenge in a more appropriate context, the basic jurisdiction and competence of the Commission to impose limits on franchise fees.

The second respect in which the Commission's holding in the subject Declaratory Ruling were adverse to CCT's interests relates to the general issue of "grandfathered" franchises in New York, as summarized by the Commission's holding in (c) above. It is this holding of the Commission that CCT desires to modify because it is not only based upon erroneous findings of fact and conclusions of law, but it could result, contrary to the Commission's predictions, in significantly deleterious effects

on the ability of CCT to collect its own proper 2% assessment.*

At issue is the effect of the provisions of Section 76.31(b) of the Commission's Rules upon fees and assessments that may be collected from cable television systems in New York that were in operation prior to March 31, 1972. It is important to recognize that this issue was secondary to those raised by CCT in its original petition for declaratory ruling, and was only raised by the intervening parties, the Association and MCTV (see paragraphs 13 and 14 of the subject Declaratory Ruling, supra).

In view of the fact that the instant proceeding represents the first instance in which the Commission has ruled upon this issue, this issue should have given more careful consideration, or perhaps treated in a separate proceeding.

* As the Commission is aware, CCT has been engaged for some time in litigation against various cable television companies in efforts to collect the above-described State assessment. Some of these cases have already resulted in success for CCT (e.g., Ceracche Television Corp. v. Kelly, 80 Misc. 2d 956, 364 N.Y.S. 2d 276 (1974), aff'd, 50 App. Div. 2d 134, 376 N.Y.S. 2d 217 (1975)), while others remain pending at this time (e.g., New York State Commission on Cable Television v. Sterling Communications, Inc., et al., pending in the New York Supreme Court, Albany County, and stayed as of February 4, 1976 to await the Commission's decision in the instant proceeding).

At paragraph 4 of the subject Declaratory Ruling, supra, the Commission quotes the language of Section 76.31(b) of its Rules, which language is the stage upon which the drama of this entire proceeding is played. The above-referenced quotation, however, omits (and without so much as a reference or indication of omission) the concluding sentence of the paragraph, relating to its effectiveness with respect to "grandfathered" cable television systems. To rectify this omission, said sentence is provided, as follows:

The provisions of this paragraph shall not be effective with respect to a cable television system that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first.

Particular note should be taken that the above-quoted language refers to the effectiveness of paragraph 76.31(b) "with respect to a cable television system that was in operation prior to March 31, 1972", and not with respect to any particular fees

or assessments imposed on that date. Thus, this language appears to "grandfather" cable television systems, not fees.

The above interpretation of the quoted language is not only consistent with the plain meaning of the words themselves, but it is also consistent with the purpose and intent of the Commission at the time that Section 76.31(b) was adopted as a Rule. In its Cable Television Report and Order, FCC 72-108, 36 FCC 2d 143 (1972), the Commission stated, at paragraph 187, as follows:

Grandfathering. The grandfathering provisions of our rules with respect to franchise standards seek to achieve a large measure of flexibility. An existing cable system will be required to certify within five years of the effective date of these rules or on renewal of its franchise, whichever comes first, that its franchise meets the requirement of the rules. This deferral should relieve both cable systems and local authorities of whatever minor dislocations our rules might otherwise cause.

Page 11

In its Letter of Intent (to the United States Congress), FCC 71-787 (August 5, 1971), the Commission expressed similar sentiments, beginning, "we will apply generous grandfathering provisions." The clear intention of the Commission in 1972 was to require all cable television franchises in the United States to come into consistency with the newly adopted standards within 5 years, and to avoid the creation of new problems of conflicting regulation during the interim period.* Unfortunately, the Commission's recent ruling in this respect has created just such problems.

At paragraph 20 of the subject Declaratory Ruling, supra., the Commission stated, ". . . because the state fee was imposed after March 31, 1972, it is subject to the fee limitation and is not considered outside of the Section 76.31(b) limitation

* Thus, even the imposition of new and higher fees imposed on "grandfathered" cable television systems during the interim period should be considered acceptable and beyond the scope of the Commission's review until a new franchise is negotiated or March 31, 1977.

until March 31, 1977, as are fees imposed at an earlier date."

By this language, the Commission has ruled, for the first time, that the last sentence of Section 16.31(b) of its Rules "grandfathers" the fees imposed as of March 31, 1972, and not the systems in operation at that time.

This approach consequently results in a number of cumbersome regulatory predicaments. In 1972 the Commission set up an enforcement procedure for its new cable television standards that was based upon a certification system. In short, cable systems would be required to apply for and obtain federal operating authorizations, and their compliance with the new standards could be mandated as a prior condition to the Commission's grant of such authorizations. In view of the fact that "grandfathered" cable television systems were not obliged to even seek Commission certification until the expiration of their

franchises or March 31, 1977 it would seem clear that the Commission provided itself with no mechanism to control, during the interim period, the relations between such systems and the governments with which they dealt. The recent ruling on this point, therefore, appears to be an attempt to impose such control retroactively.

A more serious predicament now arises at the State level. At paragraph 21 of the Declaratory Ruling, the Commission indicated that although "grandfathered" municipal fees in New York that are in excess of the limits of Section 76.31(b) may remain in effect, the imposition of an additional State assessment in 1973 was improper. If this is the case, the question arises as to which government imposition must give way to the other, and in what manner. The Commission's ruling appears to solve this quandary in a deceptively simple manner. Section 818 of the New York Executive Law, it concludes, solves the problem automatically

by operation of State law. Unfortunately, this may not be the case.

Section 818 provides as follow:

Nothing in this article shall be construed to limit the power of any municipality to impose upon any cable television company, a fee, tax or charge, provided that any such fee, tax or charge when added to the amount payable to the commission [CCT] pursuant to section eight hundred seventeen does not exceed the maximum amount permitted by applicable federal laws, rules, or regulations. N.Y. Exec. Law, art. 28, section 818 (McKinney 1975).

The Commission appears to have made an unwarranted reliance upon the effect of this section. At paragraph 21 of its Declaratory Ruling, it states:

We note that Section 818 of the New York law [footnote omitted], as construed by the CCT, would seem to have taken into account the possibility of such a conflict with federal limitations and to have resolved it in such a manner that the combined state and local fees will not exceed the requirements of Section 76.31. CCT indicates that Section 818 makes clear that those fees charged by local governments, when added to the state fee, may not exceed the applicable federal limitations. Accordingly, the fact that both state and local fees will be levied does not render the state fee inconsistent with our rules.

Thus, the Commission has claimed that it is CCT's own interpretation of New York law that Section 818 has the effect of reducing the fee that may be collected by a municipality from even a "grandfathered" cable television system. This is error. CCT wishes to make clear hereby that it never intended to express such an interpretation of Section 818. As indicated above, CCT's original pleadings were addressed to the fundamental issues it raised regarding the effect of Article 28 of the Executive Law with respect to New York cable television systems that are subject to the limitations of Section 76.31(b) of the Commission's Rules. CCT did not attempt to express a definitive ruling regarding the effect of Section 818 with respect to "grandfathered" cable television systems.

This error is rendered more poignant by the Commission's further remarks at paragraph 21 of the Declaratory Ruling, as follows:

While the Association indicates that other interpretations of Section 818 than that set forth by CCT are possible and the full meaning of the section has not been judicially resolved, for purposes of this opinion we have assumed the correctness of the CCT construction. If there is a dispute as to the meaning of this section, it can only be resolved by the New York courts. And if the CCT reading turns out to be incorrect then this opinion will have to be revised in light of any different interpretation.

CCT must agree with the assertions of the Association in this matter; several interpretations of Section 818 may be possible and the full meaning of the section with regard to "grandfathered" systems has not yet been judicially resolved. The Commission has invited a revision of its opinion to more accurately reflect an interpretation of Section 818 other than the one it relied upon; CCT suggests that such a revision is appropriate now.

Three basic interpretations of Section 818 appear possible with respect to "grandfathered" cable television systems:

1. Section 818 does not apply at all to "grand-fathered" municipal fees, rather it was intended only to bar the adoption of new fees that would exceed applicable federal standards when considered in conjunction with the State assessment.

2. Section 818 applies to all municipal fees in New York regardless of the date of their initial adoption, but was intended to incorporate the concept of "grandfathering" in its general reference to "applicable federal laws, rules, or regulations."

3. Section 818 was intended to apply immediately to all municipal fees imposed in New York, and had the effect of waiving federal "grandfather" status by State law.

None of these three interpretations is consistent with the Commission's language at paragraph 21 of its Declaratory Ruling. The first is obviously contradictory to the whole

thrust of the Commission's conclusion that, "Section 818 makes clear that those fees charged by local governments, when added to the state fee, may not exceed the applicable federal limitations." The second is inconsistent with the Commission's statement that, "if existing fees are increased by the addition of the state fee, this is acceptable as long as the 5% limit is not exceeded." Obviously, if Section 818 does incorporate a "grandfathering" concept, then the imposition of the State assessment upon a cable television system already subject to a "grandfathered" 6% municipal fee would be acceptable so long as the system did not, as a result, have to pay more than a total of 6% to the State and the municipality* The Commission's reference to the 5% limit defeats this interpretation. The third interpretation proposed

above would not be consistent with the Commission's remark
* A more serious question arises in those instances in which the municipal fee imposed on a "grandfathered" cable television system as of March 31, 1972, is materially modified (either up or down or in its basis) subsequent to that date. Would this result in an immediate and complete loss of "grandfathered" status for the system in this respect?
[Footnote continued on next page]

that, "we have accepted grandfathered fees in excess of 5% only until March 31, 1977." This third interpretation would require the Commission to conclude that there have been no "grandfathered" fees in New York since January 1, 1973 (the effective date of Section 818) and that all New York franchises should have been in strict compliance with the provisions of Section 76.31(b) of the Rules since that date. This the Commission does not seem anxious to conclude.

One principal fact must be grasped. The Commission's reference to Section 818 of the New York Executive Law clearly does not resolve the very serious disputes that arise naturally from its ruling that CCT's assessment is subject to the limits of Section 76.31(b) of the Rules even with respect to "grandfathered" cable television systems. The Commission should be aware that, as of the preparation of this petition, other parties

[Footnote continued from previous page]
Moreover, what would be the status of such a system with respect to the provisions of Section 818 of the Executive Law? In view of the confusion that has resulted from the Commission's Declaratory Ruling with regard to "grandfathered" cable television systems, the above questions appear newly relevant.

are already preparing litigation seeking the rebate of up to millions of dollars previously paid to CCT and New York municipalities on the then common understanding of "grand-fathered" status.

In conclusion, CCT respectfully pleads that the Commission reconsider its holding in its recent Declaratory Ruling, supra, that Section 817 of the New York Executive Law is not consistent with Section 76.31(b) of the Rules insofar as the state fee, when combined with an applicable "grand-fathered" municipal fee, exceeds 5% of total gross subscriber revenues.

In particular, CCT requests that the Commission, upon a more serious consideration of the intent and language of Section 76.31(b) of the Rules and of the consequences of its precedential holding herein, reverse its ruling that the last sentence

of Section 76.31(b) "grandfathers" only the fees imposes as of March 31, 1972, and conclude, instead, that this sentence has the effect of "grandfathering" any fees or assessments imposed upon cable television systems, in operation prior to March 31, 1972, until the expiration of their current franchises or March 31, 1977, whichever occurs first.

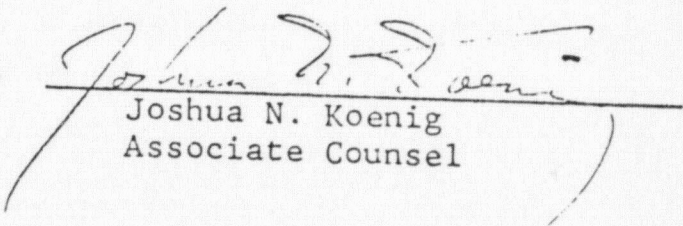
In the alternative, should the Commission not choose to grant the relief requested above, CCT asks that the Commission modify its holding in its recent Declaratory Ruling, supra, to the effect that it would not be inconsistent with the provisions of Section 76.31(b) of the Rules to interpret Section 818 of the New York Executive Law in such a manner that it would incorporate the concept of federal "grandfathering," as described above herein.

Respectfully submitted,

STATE OF NEW YORK
COMMISSION ON CABLE TELEVISION

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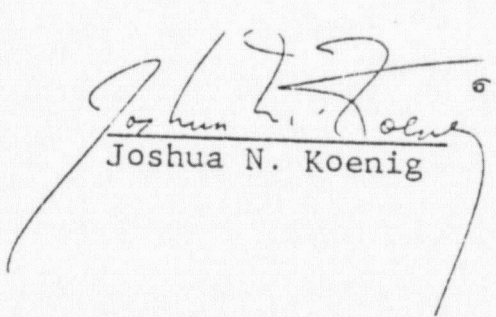
CERTIFICATE OF SERVICE

51

I, JOSHUA N. KOENIG, Associate Counsel of the New York State Commission on Cable Television, do hereby certify that I have this 4th day of August, 1976, sent true copies of the foregoing "Petition for Reconsideration" of the Declaratory Ruling in CSR-654, FCC 76-599, Mimeo No. 41168 (adopted June 24, 1976; released July 9, 1976), by United States mail, First Class postage prepaid, to the following parties:

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Joshua N. Koenig

BEFORE THE
Federal Communications Commission
 WASHINGTON, D. C.

In re:

New York State Commission)
 on Cable Television)

Petition for Declaratory)
 Ruling)

CSR - 654

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

Manhattan Cable Television, Inc. ("MCTV"), by its attorneys, hereby opposes the Petition for Reconsideration ("Petition") of the Commission's Declaratory Ruling in the above-entitled matter (FCC 76-599, Mimeo No. 41168, released July 9, 1976) submitted by the New York State Commission on Cable Television ("CCT").^{1/}

1. CCT's petition seeks reversal of the Commission holding in paragraphs 15(c) and 21 of the Declaratory Ruling that grandfathered franchises do not have to pay a

^{1/} The CCT petition was dated August 4, but evidently not received by the Commission until August 9, 1976. On August 18, 1976 MCTV submitted a timely motion for extension of time from August 24 until September 2, the date upon which this Opposition is being submitted. The extension was granted by the Chief of the Cable Television Bureau on August 31, 1976.

- 2 -

combined state and municipal fee in excess of either 5% of basic subscriber revenues or the amount of any grandfathered municipal fee. CCT argues principally that, in reaching its holding, the Commission may have misconstrued §818 of the New York State Executive Law and that this led to the Commission's erroneous holding. We will show below that the Commission should not revise its holding because, among other reasons, the meaning of §818 is completely irrelevant to the reasoning or the result of the Commission's holding in paragraphs 15(c) and 21.

2. CCT's request for a declaratory ruling sought the Commission's advice as to whether "CCT's system of allocation and collection of its operating expenses of up to 2% of 'gross annual receipts'"^{2/} is consistent with Section 76.31(b) of the Commission's Rules. The New York State Cable Television Association ("Association") and MCTV both filed comments pointing out, among other things, that the CCT request for declaratory ruling was at odds with Commission precedent and lacked the required degree of supporting facts.^{3/}

^{2/} Declaratory Ruling, ¶ 1. (Footnote omitted.)

^{3/} E.g., "Response to Petition for Declaratory Ruling," filed by the Association February 24, 1975; "Comments of Manhattan Cable Television, Inc.," filed March 31, 1976 (hereinafter cited as "Comments").

- 3 -

3. MCTV, in particular, devoted a number of paragraphs of its Comments (§§ 23-27) to the impact of CCT's requested ruling upon "grandfathered" cable systems in New York State. MCTV specifically called the Commission's attention to the fact that it "must consider and resolve the issue of the aggregate total of each of these grandfathered fees [payable by cable systems in operation prior to March 31, 1972] and the CCT fee [the up-to-2% fee payable to the state under Section 817 of the Executive Law] with Commission guidelines." (Id., ¶ 24.) MCTV then argued that "in those instances where the combined fee exceeds 3%, CCT should not have been collecting any fees since its creation." (Id., ¶ 25.) Although CCT was served with a copy of this pleading, it chose not to submit any comments or otherwise to oppose. Under these circumstances, CCT's plaint (Petition, p. 8) that "[t]his issue should have been given more careful consideration, or perhaps treated in a separate proceeding" rings hollow. Neither the Commission nor the private litigants here should be penalized because of CCT's failure to oppose or otherwise timely comment prior to the Commission's Declaratory Ruling, a failure that CCT has not explained.

4. In paragraph 15 of its Declaratory Ruling the Commission reached three basic holdings - (a) the state 2% fee

- 4 -

is consistent with Section 76.31(b) of the Commission's Rules despite the fact that it is based upon "gross annual receipts" rather than revenues only from basic subscriber services not including auxiliary services; (b) the state fee, when combined with the municipal fee, can exceed 3% of basic subscriber revenues but only so long as the combined fees do not exceed 5% of basic subscriber revenues; and (c) the state fee, when combined with an "applicable grandfathered municipal fee", cannot exceed 5% of basic subscriber revenues. CCT seeks reconsideration only of holding (c).^{4/}

5. CCT contends that the Commission's determination that the combined (state and municipal) grandfathered fee cannot exceed 5% misconstrues the grandfather provision of Section 76.31(b), and that, in reaching its decision, the Commission did not take proper account of the impact of its decision upon the collectability of the state

^{4/} With regard to non-grandfathered cable systems, CCT expresses doubt that, "at some point in the future, particularly with respect to a cable television system with a high proportion of revenues from 'pay cable' sources" (Petition, p. 6), it will be able to obtain all of its 2% assessment since the combined state and municipal fee would exceed 5% of the basic subscriber revenues. There is no need to address this matter since CCT has elected not to seek Commission reconsideration of holdings (a) or (b).

- 5 -

fee. CCT argues that the last sentence of Section 76.31(b)^{5/} refers to the effectiveness of Section 76.31(b) "'with respect to a cable television system that was in operation prior to March 31, 1972,' and not with respect to any particular fees or assessments imposed on that date" (Petition, pp. 9-10).

Accordingly, CCT contends that Section 76.31(b) did not grandfather the payment of fees. In CCT's view, the 1972 Cable Television Report^{6/} and the 1971 Letter of Intent^{7/} demonstrate that

"[t]he clear intention of the Commission in 1972 was to require all cable television franchises in the United States to come into consistency with the newly adopted standards within 5 years, and to avoid the creation of new problems of conflicting regulation during the interim period." (Petition, p. 11, footnote omitted.)

^{5/} The last sentence of Section 76.31(b) states:

"The provisions of this paragraph shall not be effective with respect to a cable television sytem that was in operation prior to March 31, 1972, until the end of its current franchise period, or March 31, 1977, whichever occurs first."

^{6/} Cable Television Report and Order, 36 FCC 2d 143, 210, 24 RR 2d 1501, 1578 (1972) (hereinafter cited as 1972 Cable Television Report).

^{7/} FCC Letter of Intent to Congress, August 5, 1971, FCC 71-787 reprinted in full, 1972 Cable Television Report, 36 FCC 2d at 260, Appendix C.

- 5 -

6. We disagree. The language and context of Section 76.31(b), and its purpose, as set forth in the seminal and subsequent Commission rulings, leave no doubt that CCT is plainly wrong. We admit that the wording of the last sentence of subparagraph (b) may not be a model of clarity. Still, however, there is no doubt that the last sentence grandfathered the pre-March 31, 1972 franchise fee provisions. The grandfathering of a system, rather than some particular aspect of its operations (i.e., the signals carried) or its franchise (i.e., the fee), is essentially a meaningless act and of no practical effect.^{8/} Since the only substantive provision in subparagraph (b) concerns fees, it has to have been intended to grandfather the fee provision in a system's franchise.

7. That this is the only logical reading of the grandfather provision of subparagraph (b) is confirmed

^{8/} " 'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." Sutherland Statutory Construction, Volume 2A § 46.06 (4th ed. 1973).

- 7 -

by the Commission's consistent subsequent interpretations in innumerable cases. See e.g., CATV of Rockford, 38 FCC 2d 10, 15, 25 RR 2d 858, 864 (1972); Commonwealth Cable TV Co., Inc., 51 FCC 2d 448, 449, 32 RR 2d 1497, 1499 (1975).^{9/} Moreover, this reading, not CCT's, is consistent with the purpose of that grandfather provision.

8. There is no dispute that the first part of the CCT proposition quoted above is correct, viz, that all cable television franchises including their fee provisions are required to become consistent no later than March 31, 1977. But the purpose of the grandfather provision is not to avoid the "creation of new problems of conflicting regulation" but rather to avoid, during the interim period, conflicts between pre-existing local regulations and the new federal regulations in those instances where an existing franchise already contains fee provisions in excess of the new franchise guidelines. It was only in those circumstances that the Commission wished to avoid the "minor dislocations"^{10/}

^{9/} It is also an elementary rule that "an administrative agency's interpretation of its own regulation is controlling 'unless it is plainly erroneous or inconsistent with the regulation.'" Sutherland Statutory Construction, Volume 1A § 31.06 (4th ed. 1973); Immigration & Naturalization Service v. Stanisic, 395 U.S. 62 (1969); Udall v. Tallman, 380 U.S. 1 (1965).

^{10/} 1972 Cable Television Report, 36 FCC 2d at 210; 24 RR 2d at 1578.

- 8 -

(such as the necessity to renegotiate franchise provisions and the uncertainty created thereby) and conflicts between local, state and federal authorities that might occur if it insisted that inconsistent franchise fee provisions be immediately reformed. The Commission evidently believed that the vice of excessive fees could be tolerated in grandfathered systems for a short period of time. The Commission certainly, however, did not mean to bless the subsequent creation of new inconsistencies with its guidelines. The Commission had determined unequivocally that, for several reasons, high franchise fees were contrary to the public interest.^{11/} There was nothing in its conclusion that

^{11/} The Commission determined that fees had to be kept to a reasonable level because:

"First, many local authorities appear to have extracted high franchise fees more for revenue raising than for regulatory purposes. Most fees are about 5 or 6 percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to Congressionally-imposed copyright payments." (1972 Cable Television Report 36 FCC 2d at 209, 24 RR 2d at 1578.) (Emphasis added, footnote omitted.) Accord, e.g., "Clarification of the Cable Television Rules," Cable Television, 46 FCC 2d 175, 201, 29 RR 2d 1621, 1652 (1974).

indicated that, despite this finding, the Commission nevertheless believed it to be in the public interest to postpone the effective date of its policy on new fees for another five years. Yet, the unavoidable result of CCT's interpretation would be to permit, if not encourage, the imposition, during the interim period, of new and higher fees for grandfathered cable systems.^{12/} This reading would nullify the purpose of subparagraph (b) as far as grandfathered systems are concerned.

9. Moreover, CCT's argument would stand the whole raison d'etre of grandfathering on its head. A grandfathered system would confront the possibility of being treated more harshly than a new cable system. In contrast to a new system, a grandfathered system will usually have commenced operations under one set of fees and would have invested significant amounts of money. It would be difficult for such a system to walk away from its franchise without

^{12/} CCT candidly admits this in its footnote on page 11, in which it states:

"Thus, even the imposition of new and higher fees imposed on 'grandfathered' cable television systems during the interim period should be considered acceptable and beyond the scope of the Commission's review until a new franchise is negotiated or March 31, 1977."

- 10 -

suffering substantial financial losses.^{13/} Yet CCT would subject a grandfathered system, but not a new system, to increased fees. The Commission could not have intended this result - that an operating system would be subject to increased fees but that a system not yet in existence would be not so subject.

10. CCT argues in effect that, regardless of the meaning of the grandfather provision of subparagraph (b), the Commission should not limit the combined fees paid by grandfathered systems in the interim period to only 5%, because the effect might be to reduce the state fee below 2% where the combined fee exceeds 5%. It is CCT's view that in paragraph 21 the Commission apparently concluded that Section 818 of the Executive Law had the effect of reducing the municipalities fee for a grandfathered system, rather than the state fee, in order to meet the 5% federal guideline. CCT points out that there has as of yet been no definitive state judicial interpretation of this provision. CCT then contends that the Commission's reading may not be correct and the Commission should therefore revise its holdings in

^{13/} For instance, to date MCTV has invested more than 35 Million Dollars in its cable system and has accumulated losses of more than 18 Million Dollars.

- 11 -

paragraph 21.^{14/} (Petition, pp. 15-16.) This request should be denied for several reasons.

11. As CCT has admitted, because Section 818 has not yet been authoritatively construed by a local state court, its import is still uncertain. But this means that there is at least as great a likelihood that the Commission's interpretation (the one that CCT first promoted, despite its apparent disavowal)^{15/} will prove to be correct. Under these circumstances, it would obviously be premature for the Commission to revise paragraph 21 at this time.^{16/}

12. Moreover, there is, in any event, no need or reason to revise paragraph 21. The question of whether the state fee or the municipal fee must be reduced to bring the combined fee into compliance with the Declaratory Ruling maximum for grandfathered franchises is irrelevant to holding (c) as explained in paragraph 21. There the Commission stated that

^{14/} CCT alleges that it "never intended to express such an interpretation of Section 818" (Petition, p. 15).

^{15/} Compare Petition [for reconsideration] p. 15, with CCT, Petition for Declaratory Ruling, text accompanying footnote, p. 9.

^{16/} We do not believe that a reading of Section 818 contrary to that indicated by the Commission in paragraph 21 would in fact require the Commission to revise paragraph 21 because, as we demonstrate below, the central holdings in the first part of paragraph 21 are not affected by the meaning of Section 818.

- 12 -

"fees in excess of 5% are an unreasonable interference with federal regulatory goals for the development of a nationwide cable communication industry. We have accepted grandfathered fees in excess of 5% only until March 31, 1977, to allow a reasonable transition period. The imposition of additional burdens on top of an already burdensome situation is unacceptable."

13. These central holdings do not depend upon the manner in which the maximum permissible franchise fee is divided between the state and the municipality. A fee that is burdensome because it exceeds 5% certainly does not become less burdensome to the cable system because more of it is paid to the state than to the municipality. The proper apportionment of the fee as between the state and the municipality is peculiarly a matter of state law, and the Commission has wisely decided not to intervene. If Section 818 should be construed in the appropriate forum as requiring a reduction in the state fee and not the municipal fee in grandfathered situations, and if this decision should adversely affect CCT, CCT has a ready and appropriate avenue of relief in the New York State legislature which could take a variety of approaches to assuring that CCT is sufficiently funded to accomplish its validly-assigned responsibilities.

14. In summary, the Commission should deny the relief sought by CCT's Petition for Reconsideration. CCT has failed to satisfy the threshold requirements of Section 1.106(c) of the Rules for reconsideration of a carefully-

- 13 -

deliberated Commission decision. There has been no intervening event since the Declaratory Ruling; CCT has presented no new facts; and the public interest clearly still requires that grandfathered cable systems be as protected as post 1972 cable systems from new fees which exceed the Commission's ^{17/} maximums.

Respectfully submitted,

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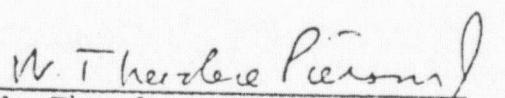
^{17/} It should be remembered that the Commission's holdings were generous to the state in permitting the combined state and municipal fee to equal up to 5% of basic subscriber revenues, the uppermost end of the Commission's guidelines on reasonableness. And the Commission reached this determination without requiring CCT to submit the hard evidence on costs previously required (See e.g., Cable Television, 46 FCC 2d 175, 203, 29 RR 2d 1621, 1655 (1974)) nor permitting other interested parties, cable systems and municipalities to comment as required by Section 76.31(b).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Manhattan Cable Television, Inc., "Opposition to Petition for Reconsideration" were served this 2nd day of September, 1976, by sending copies thereof by United States mail, postage prepaid, to the following persons at the addresses shown below:

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re:)
)
NEW YORK STATE COMMISSION)
ON CABLE TELEVISION) CSR-654
)
Petition for Declaratory Ruling)

To: The Commission

OPPOSITION TO PETITION FOR RECONSIDERATION

The New York State Cable Television Association (the Association), by its attorneys, hereby opposes the Petition for Reconsideration filed by the New York State Commission on Cable Television (CCT) in the above-captioned proceeding. The Association is familiar with an Opposition to CCT's Petition to be filed by Manhattan Cable Television, Inc. (MCTV), another party to this proceeding. The Association concurs in MCTV's Opposition and will not repeat at length the arguments contained in that pleading.

CCT's Petition relates to the Commission's determination that in view of the post-1972 adoption of a state cable television fee, no municipality in the State of New York may assess a fee so that the combined state and local fees exceed five (5) percent of the system's gross subscriber revenues, even if the system involved is otherwise grandfathered.

- 2 -

MCTV points out that in its pleadings, MCTV raised this very issue and CCT failed to respond. The Association also raised this same issue in its "Supplement to Response to Petition for Declaratory Ruling" filed June 9, 1975. Indeed, at page 10 of that pleading, the Association asked the Commission to provide essentially the same relief as is embodied in paragraph 21 of its decision in this proceeding. CCT similarly failed to respond to the Association's position on this matter.

It is accordingly evident that CCT had ample opportunity to make its views known prior to the Commission's decision in this proceeding. For whatever reason, CCT chose not to do so. CCT should not now be permitted to relitigate matters that could and should have been addressed earlier.

At pages 11 and 12 of its Petition, CCT suggests that the Commission's conclusion in paragraph 21 of the instant decision represents a novel Commission policy. This is incorrect. As the Association noted in its June 9, 1975 "Supplement", the Commission specifically addressed the question of post-1972 amendments of grandfathered franchises in paragraphs 75 and 76 of its Clarification of Rules and Notice of Proposed Rulemaking, 46 FCC2d 175 (1974). The Commission therein made clear that grandfather rights accorded to pre-1972 franchises do not extend to post-1972 amendments. CCT never sought reconsideration

- 3 -

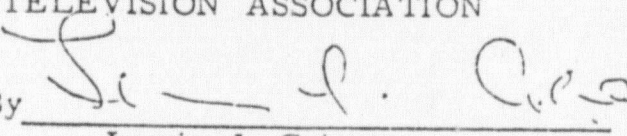
of the Commission's conclusion in this respect. The Commission's decision in this case accordingly represents a correct application of these previously announced policies in view of the unique circumstances involved here, as discussed at page 10 of the Association's June 9, 1975 "Supplement."

The only remaining argument of CCT relates to the possible difficulties under state law of apportioning the five (5) percent fee between CCT and the franchising municipalities. This is clearly irrelevant. The Rules establish a maximum permissible fee. How this fee is apportioned between various instrumentalities of the states is purely the states' problem and no concern of this Commission. To hold otherwise would permit the states to avoid the Commission's Rules by creating ambiguities such as the one now relied on by CCT in its attempt to avoid the impact of the Commission's Rules.

It is accordingly urged that CCT's Petition for Reconsideration should be denied.

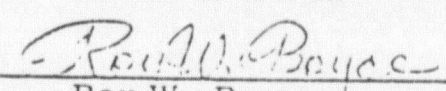
Respectfully submitted,
NEW YORK STATE CABLE
TELEVISION ASSOCIATION

By


Lewis I. Cohen

1129-20th Street, N.W.
Washington, D. C. 20036

By


Roy W. Boyce
COHEN AND BERFIELD
Its Attorneys

Date: September 2, 1976

CERTIFICATE OF SERVICE

I, Violet Castellanos, a secretary in the law firm of Cohen and Berfield, Washington, D. C., certify that on this 2nd day of September, 1976, I sent by first class mail, postage prepaid, copies of the foregoing "Opposition to Petition for Reconsideration" to the following:

Thomas Ryan, Esquire ✓
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Commission on Cable Television
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Violet Castellanos
Violet Castellanos

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ROSE ANN BATTISTA, being duly sworn, deposes
and says that she is employed in the office of the Attorney
General of the State of New York, attorney for New York
State Commission Cable Television herein. On the 30th day
of June, 1977, she served the annexed upon the following
named persons:

General Counsel
Federal Communications Comm.
1919 M. Street, N.W.
Washington, D.C. 20554

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United States Department
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Attorneys in the within entitled proceeding by depositing
a true and correct copy thereof, properly enclosed in
a post-paid wrapper, in a post-office box regularly maintained
by the Government of the United States at Two World Trade
Center, New York, New York 10047, directed to said attorneys
at the addresses within the State designated by them for
that purpose.

Rose Ann Battista
ROSE ANN BATTISTA

Sworn to before me this
30th day of June, 1977

Philip J. [Signature]
Assistant Attorney General
of the State of New York